IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEO LAWTON,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 01-2784
SUNOCO, INC., MASCOT PETROLEUM COMPANY, INC., and LOUIS MAIELLANO,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. JULY 17, 2002

Presently before this Court is the Defendants' Motion for Summary Judgment. This action arises out of the Plaintiff's, Leo Lawton ("Lawton"), allegations that his direct employer Mascot Petroleum Company Inc. ("Mascot"); Mascot's parent corporation Sunoco, Inc. ("Sunoco")(or collectively "Sunoco"); and his manager Louis Maiellano ("Maiellano") have discriminated against him on the basis of his race. Specifically, Lawton alleges claims for failure to promote, wage discrimination, hostile work environment, retaliation, disparate impact, and intentional infliction of emotional distress. For the reasons that follow, the Motion will be granted.

I. BACKGROUND

In March 1999, Maiellano, who was at the time the Area Manager for Sunoco, interviewed and hired Lawton, an African-American male, to be the Food Services Manager at Sunoco's Walnut Street APlus store in Philadelphia, Pennsylvania based on his past twelve years of experience in the food service industry. As a Food Services Manager, Lawton's

responsibilities include overseeing the Walnut Street Store's pizza, Subway, coffee, and breakfast operations, as well as supervising approximately seven other food service employees. Lawton is also responsible for submitting written reports to Subway containing sales information. In May 1999, Lawton received his first formal evaluation and a 2.4% raise from Maiellano. Lawton received an overall rating of "Accomplished" although Maiellano did state that there were some problems with record keeping and submitting the Subway reports on time.

Lawton alleges in his Complaint that he has been denied promotions from July 1999, until the present time. Specifically in July 1999, the Walnut Street store required a General Manager, who would be responsible for the entire store, and a Facility Manager, who would report to the General Manager and would be primarily responsible for paperwork and inventory control. Lawton was not promoted to either of these positions. The Defendants claim that Maiellano hired George Tscherniawsky ("Tscherniawsky") as the General Manager because he had previously managed other convenience stores and had owned his own business. The Defendants claim that Maiellano hired Ivan Vynyk ("Vynyk") as the Facility Manager because he had been very successful at handling paperwork and controlling inventory at other Sunoco locations. The Defendants further allege that they did not promote Lawton to either of these positions because he lacked retail management experience. The Defendants also claim that they wanted Lawton to remain as the Food Services Manager so that he could continue to develop and expand the food service business at the Walnut Street Store, which he had been hired to do a few months earlier. Lawton claims, without support, that the two individuals who were hired have "suspect qualifications and experience" and that Lawton was not made aware of the two job positions.

Later in 1999, Lawton also was not promoted to the Facility Manager position at the APlus store on Fairmont Avenue in Philadelphia, Pennsylvania. The Defendants claim that Lawton was not selected for this promotion because he lacked retail management experience, unlike the individual that was hired for the position. In the Spring of 2000, Sunoco acquired an APlus store in Chester, Pennsylvania. Maiellano assigned Tscherniawsky to oversee the store in addition to his normal duties. A permanent manager was never hired for the Chester store because it was closed two months after it was acquired by Sunoco. Also in 2000, the Facility Manager position at Sunoco's Prospect Park, Pennsylvania APlus store became available. Maiellano hired William Dadich ("Dadich") for the position because of Dadich's prior years of experience managing another APlus store. The Defendants claim that they did not hire Lawton for this position because, unlike Dadich, Lawton did not have prior experience and success as a store manager. The Defendants also allege that Maiellano was concerned that Lawton would not be able to handle the administrative paperwork required for a Facility Manager position based on Lawton's past performance.

Lawton claims that he was again passed over for these positions and that he did not know about the positions until after they were filled. Lawton also asserts that he asked Maiellano and later Richard Crisci ("Crisci"), who succeeded Maiellano as Sunoco's Area Manager in June 2000, if he could participate in Sunoco's manager-in-training ("MIT") program, but Lawton's request was denied. Lawton claims that he is not qualified for a managerial position without this training. The Defendants claim that, generally, only newly hired individuals who are not currently Sunoco employees participate in MIT training. The Defendants also claim that MIT training is not a prerequisite for becoming a store manager. Lawton testified that he is

aware of two African-Americans who were promoted to manager positions without first completing MIT training. Furthermore, the Defendants allege that eleven of the sixteen MIT trainees under Maiellano and Crisci are African-American. In May 2000, Maiellano gave Lawton his second formal evaluation. The evaluation was generally positive, however, Maiellano noted that the Subway paperwork remained an issue. Lawton also received a 3.08% raise.

On January 11, 2001, Crisci met with Lawton to discuss several issues. One issue concerned fried chicken that was supposed to be delivered to the Walnut Street store, but was not delivered. Lawton could not contact Crisci to discuss and rectify the situation because Lawton could not find Crisci's phone number or other contact information. Another issue involved employee complaints which stated that Lawton had been correcting employees in front of customers and threatening to terminate them. The complaints also stated that Lawton had issued written warnings to employees without first obtaining approval. At the meeting, in response to the chicken incident, Crisci gave Lawton his contact information. Crisci also told Lawton to obtain approval from Vynyk before engaging in corrective actions against other employees. On January 18, 2001, Crisci, Lawton and Chris Buitron ("Buitron"), Crisci's direct supervisor, met again to discuss the employee complaints against Lawton. Buitron told Lawton to reprimand employees away from other co-workers and customers. However, in the Spring of 2001, Sunoco received several more complaints by other employees regarding Lawton. In May 2001, Crisci gave Lawton his formal evaluation. Lawton received a satisfactory review, except in the "Personnel" category in which he received a "Needs Improvement" rating because of the employee complaints filed against him.

In May 2001, Vynyk, who was then General Manager of the Walnut Street store, left, and the position became available. Crisci told Lawton about the opening, and Lawton interviewed for the position. During the interview, Lawton told Crisci that he was not interested in the position without first receiving MIT training. Crisci told him that he would give Lawton a few days to get acquainted with the position, but Lawton felt that was not enough time. Therefore, Crisci did not select Lawton for the position but selected another individual who had positive experience as a Facility Manager at two other stores.

Lawton claims that despite a policy to promote from within, he was never offered a promotion and was unable to apply for open positions because he did not become aware of them until after they were filled. The Defendants dispute that such a policy exists. On June 1, 2000, Lawton filed his charge of discrimination involving his failure to promote claim with the Equal Employment Opportunity Commission ("EEOC"). Lawton filed the present action on June 6, 2001. His Complaint alleges disparate treatment in violation of Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000e, *et sec.* ("Title VII") (Count I; which includes Lawton's claims for failure to promote, wage discrimination and hostile work environment); racially disparate impact in violation of Title VII (Count II); retaliation in violation fo Title VII (Count VI); mirror violations of the Pennsylvania Human Relations Act, 43 Pa. Con. Stat. § 955(a) *et seq.* ("PHRA") (Count VII); and intentional infliction of emotional distress (Count VIII).

II. STANDARD

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Essentially, the inquiry is

"whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish *prima facie* each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322;Wisniewski v. Johns-Manville Corp. , 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION

A. Failure to Exhaust Remedies

As a prerequisite to bringing suit under Title VII and the PHRA, a plaintiff must first file a timely administrative charge of discrimination with the appropriate agencies. See, e.g.,

Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984). The Defendants argue that Lawton has failed to exhaust his remedies with respect to his claims of wage discrimination, hostile work environment, disparate impact, and retaliation because Lawton's EEOC charge only alleges that he was not promoted because of his race. Lawton does not dispute that his EEOC charge only alleges failure to promote. However, Lawton argues that these other claims were within the scope of the charge. The Third Circuit has held that "'[t]he relevant test in determining whether appellant was required to exhaust her administrative remedies [ ] is whether the acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom.'" Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1986)(quoting Waiters, 729 F.2d at 237). In support of this argument, Lawton states that along with his EEOC charge, he submitted to the EEOC a document entitled "Concerned Employees of Sunoco Against the Discrimination of Minorities and Disabled Persons in the Workplace" ("The Document"). The Document, which is dated one month before Lawton filed his EEOC charge, states, *inter alia*, "I have witnessed bias and discriminatory practice and behavior patterns toward minorities"; "minorities are being treated unfairly"; "white managers are abusive and undermining in their behavior towards minorities"; "minorities are being denied the right to advance"; "fearing retaliation many workers dismiss the idea of confronting their supervisor"; and "minorities make less money than white employees." (Resp. Summ. J., Ex. J). Lawton alleges that the Document is "sufficient to put the EEOC and defendants on notice" of his claims of wage discrimination, hostile work environment, disparate impact and retaliation. (Resp. Summ. J., 11).

The Defendants first counter by arguing that Lawton has not produced any

evidence that Sunoco had notice of the Document or the allegations contained therein. The Defendants argue that one of the two purposes of the exhaustion requirement is to put the "employer on notice that a complaint has been lodged against him and gives him the opportunity to take remedial action." Rogan v. Giant Eagle, Inc., 113 F. Supp.2d 777, 786 (W.D. Pa. 2000); Fucci v. Graduate Hosp., 969 F. Supp. 310, 315 (E.D. Pa. 1997)(stating that the "exhaustion requirement is designed to provide sufficient notice to the defendant concerning the charges and obtain voluntary compliance without resort to litigation."). The Defendants claim "that allegations made by a charging party to the EEOC, which were never disclosed to the employer, cannot form the basis of a later lawsuit" because it undermines the stated purpose of exhaustion. (Mot. Summ. J., 3).

The Defendants also attack each claim individually. First, the Defendants claim that the statement in the Document that "minorities make less money than white employees" would not have put them on notice of Lawton's wage discrimination claim or caused the EEOC to investigate it because the statement does not allege that Lawton made less money than other similarly situated white employees. Second, the Defendants argue that the Document does not identify a single remark or any other racially harassing conduct directed towards Lawton which would have put them or the EEOC on notice of his hostile work environment claim. Third, the Defendants allege that although the Document states that "fearing retaliation many workers dismiss the idea of confronting their supervisor", it does not describe any retaliatory conduct that actually occurred, and thus would not have been sufficient to provide notice of a retaliation claim. Fourth, the Defendants claim that the Document would not have provided adequate notice of the disparate impact claim because it does not describe any policy or practice which

caused disparate impact on African-Americans.

We agree that Lawton has failed to exhaust his remedies with respect to these claims. However, as described below, we also find that each of these claims is deficient because Lawton has failed to establish a genuine issue of material fact regarding each claim.

B. Failure to Promote Claim

Where, as here, there is no direct evidence of discrimination, the burden of proof in a discrimination claim under Title VII and the PHRA is governed by the framework established by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 352 n.4 (3d Cir. 1999). Under this framework, the plaintiff must first set forth a *prima facie* case of discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000). If the plaintiff succeeds in establishing a *prima facie* case, the employer must then produce a legitimate, non-discriminatory reason for the adverse employment action. Id. The employer only bears the burden of production and not the burden of persuasion on this issue as "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Furthermore, the defendant's burden in articulating its reason is relatively light and is satisfied if it articulates any legitimate reason for the adverse employment action. Woodson v. Scott Paper, Co., 109 F.3d 913, 920 n.2 (3d Cir. 1997). "[O]nce the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision" the plaintiff must then "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Reeves, 530 U.S. 143 (internal quotations omitted).

First, Lawton has failed to establish a *prima facie* claim for failure to promote because he has failed to show that he was qualified for the managerial positions. In order to establish a *prima facie* case of discrimination, Lawton must establish: (1) that he is a member of a protected class; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas, 411 U.S. at 802. Lawton admits that he has no prior retail experience. (Lawton Dep. at 44). Furthermore, Lawton claims that he is not qualified for managerial positions because he has not received MIT training. (Id. at 51). However, the Defendants allege that the MIT program is primarily for external candidates and not for current employees like Lawton. Also, the Defendants allege that MIT training is not a prerequisite for becoming a store manager. The Defendants further point out that Lawton admits that he knows of two African-American employees who were promoted to manager positions without obtaining MIT training. (Id. at 175-76). Lawton has not provided any evidence showing that he is qualified for a management position other than his bald assertions to that effect in his Response to the Motion for Summary Judgment, which contradict his deposition testimony. Therefore, Lawton has not established that he is qualified for a managerial position, nor has he established a *prima facie* case on this issue.

Even assuming that Lawton could make out a *prima facie* case of discrimination based upon the Defendants' failure to promote him, the Defendants have provided a nondiscriminatory reason for their actions which Lawton cannot successfully show was pretextual. Specifically, the Defendants claim that in each of the situations in which Lawton

believes he was not promoted because of his race, he was actually not promoted because he lacked managerial experience and that those who were selected were promoted or hired because of their successful past managerial experience. (See Sec. I "Background", supra).

In order to avoid summary judgment, "the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered nondiscriminatory reasons . . . was either a post hoc fabrication or otherwise did not actually motivate the employment action." Iadimarco v. Runyon, 190 F.3d 151, 166 (3d Cir. 1999)(quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)). Further, the plaintiff cannot simply show that the employer's decision was unwise or wrong since the actual issue is whether the employer had a discriminatory motive. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1109 (3d Cir. 1997)(en banc). The plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons" that the factfinder could rationally find them unbelievable and could infer that the employer did not act for the non-discriminatory reasons proffered. Id. (quoting Fuentes, 32 F.3d at 765). In order to survive summary judgment, the plaintiff must show through admissible evidence that the employer's articulated reason was not merely wrong, but that it was "so plainly wrong that it cannot have been the employer's real reason." Jones v. School Dist. of Philadelphia, 198 F.3d 403, 413 (3d Cir. 1999)(quoting Keller, 130 F.3d at 1109).

In the Motion for Summary Judgment, the Defendants provide detailed explanations for why Lawton was not promoted to each of the positions and why those chosen were promoted or hired instead. Each of the candidates selected for the various positions had prior successful experience in management, whereas Lawton had no prior retail experience and a

history of problems dealing with reports and paperwork. In another instance where Lawton alleges he should have been promoted, the Defendants counter by establishing that no permanent manager was hired for that store as it was closed soon after it was acquired by Sunoco.

In Lawton's Response to the Motion for Summary Judgment, he does not address the Defendants' nondiscriminatory reasons for hiring others to fill the managerial positions, but only addresses why he believes he has met his burden in establishing his *prima facie* case. Therefore, Lawton has failed to establish that the Defendants' articulated reason was not merely wrong, but that it was "so plainly wrong that it cannot have been the employer's real reason." Id. At best, Lawton alleges that he and other current Sunoco employees were not aware of open positions and that the Defendants gave preferential treatment to newly hired employees. Without evidence that this practice is somehow connected to the racial status of the current employees and new hires, it cannot support a violation of Title VII or the PHRA. As described by Lawton, this deficiency would apply to all current Sunoco employees, not just to those within the protected class and would likewise apply to all new hires, regardless of their race. Because Lawton has failed to establish a *prima facie* case of a failure to promote, and because he has failed to establish that the Defendants' proffered explanation is pretextual, summary judgment will be granted on this claim.

C. Wage Discrimination Claim

In order to establish a *prima facie* case of wage discrimination under Title VII and the PHRA, the plaintiffs "must demonstrate that they were performing work substantially equal to that of white employees who were compensated at higher rates than they were." Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996)(internal quotations omitted); Watson v.

Eastman Kodak Co., 235 F.3d 851 (3d Cir. 2000)(finding that the plaintiff failed to identify any evidence that he was compensated at a lower rate than similarly situated employees). Lawton has failed to produce any evidence that Sunoco paid any similarly situated Caucasian employee at a higher rate than he receives. Instead, Lawton argues that he receives "lower wages than persons similarly situated in terms of Lawton's ability, stature, longevity, tenure and experience." (Resp. Summ. J., 19). In effect, Lawton argues that those in higher managerial positions than his make more money than he does even though they allegedly have similar abilities and experience to him. By definition, Lawton is not similarly situated to those who hold higher positions nor is he performing work substantially equal to them. Again, Lawton's argument appears to be that other new employees are being hired into management positions, while current employees are not. However, this argument does not address whether similarly situated Caucasian workers are being paid higher wages than Lawton. Furthermore, this argument is not sufficient to establish any discrimination claim absent evidence that the new hires are outside of the protected class and that the current employees are all within the protected class.

Although Lawton claims that "[s]imilarly situated Caucasian employees have been promoted at a faster rate than Lawton, and have been receiving higher wages than Lawton", he provides absolutely no evidence that this is the case. In fact, Lawton does not name a single Food Services Manager or any Caucasian employee with similar qualifications and experience who has been promoted to a store manager position. Lawton may not rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive this summary judgment motion. Williams, 891 F.2d at 460. Because Lawton has failed to establish that he is paid less than other similarly situated Caucasian employees, his wage discrimination claim fails

and summary judgment is appropriate on this claim.

D. Hostile Work Environment Claim

In order to establish a hostile work environment claim under Title VII and the PHRA, a plaintiff must show that: (1) the employee suffered intentional discrimination because of his or her race; (2) the discrimination was pervasive and severe; (3) the discrimination detrimentally affected the employee; (4) the discrimination would detrimentally affect a reasonable person; and (5) the existence of respondeat superior liability. Andrews v. City of Philadelphia; 895 F.2d 1469, 1482 (3d Cir. 1990). The Supreme Court has enumerated factors that courts should consider in determining whether the alleged conduct is sufficiently serious to support a hostile work environment claim which include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). "'When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.'" Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 78 (1998)(quoting Harris, 510 U.S. at 21). Furthermore, "'[f]or racist comments, slurs and jokes to constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that instead of sporadic racist slurs, there must be a steady barrage of opprobrious racial comments.'" Al-Salem v. Bucks County Water & Sewer Auth., No. 97-6843, 1999 WL 167729, at *5 (E.D. Pa. Mar. 25, 1999)(quoting Schwapp v. Town of Avon, 118 F.3d 106, 110-11 (2d Cir. 1997)).

Here there is no evidence of pervasive or severe discriminatory conduct leading to a hostile work environment. Lawton admits that he has never been subjected to any racial remarks while employed at Sunoco. (Lawton Dep. at 308-09). However, Lawton does argue that after one female employee stole a credit card from another female employee, Tscherniawsky, the General Manager, held a general store meeting with all of the store employees. At the meeting Lawton alleges that Tscherniawsky addressed the employees as "you people" and stated that "nobody wants to work around here with a bunch of thieves" in an aggressive tone of voice. (Id. at 111-112). Lawton further alleges that he believes that there were Caucasian employees at the meeting also. (Id. at 123). Lawton was not present for the entire meeting, as he was required to see to his duties as the Food Services Manager. Lawton asserts that Tscherniawsky's behavior at this meeting shows racial discrimination because of his use of the words "you people" and "thief." The use of these phrases while addressing all of the store's employees, after one of the employees committed a theft, does not evidence racial discrimination against African-Americans.

Lawton also alleges that Maiellano circulated a fax entitled "How to Be a Good Redneck." Lawton alleges that because racially derogatory behavior is sometimes attributed to those considered "rednecks", by circulating "instructions" on how to be a redneck, Maiellano was suggesting that Sunoco employees should be bigots. However, the fax is completely devoid of any such racial undertones and has no connection to racial discrimination. The portions of the fax submitted into evidence instruct "rednecks" on how to behave at weddings (e.g. "Though uncomfortable say 'yes' to socks and shoes for this special occasion"); and driving etiquette (e.g. "When approaching a four-way stop, the vehicle with the largest tires always has the right of way"). This fax simply does not support Lawton's argument that he was subjected to workplace

harassment because he is African-American. However, even if both of these events were in fact racially oriented, the two acts alone would still not be sufficient to establish a pervasive and severe pattern of discrimination leading to a hostile workplace. See Oncale, 523 U.S. at 78. Therefore, this count must fail and summary judgment is appropriate.

E. Retaliation Claim

In order to establish a *prima facie* case of retaliation under Title VII and the PHRA, a plaintiff must establish that: (1) he or she engaged in a protected activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action. Weston v. Pa., 251 F.3d 420, 430 (3d Cir. 2001). For retaliatory conduct to rise to the level of adverse employment action, it must alter "the employee's compensation, terms, conditions, or privileges of employment, deprive[] him or her of employment opportunities, or adversely affect[] his or her status as an employee. It follows that not everything that makes an employee unhappy qualifies as retaliation." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)(internal citations omitted).

Initially in his Complaint, Lawton identified various acts which he believed were retaliatory. Two such acts concerned as a letter from Crisci reviewing the items discussed at the January 11, 2001 meeting between Crisci and Lawton, and Lawton's May 2001 performance evaluation. The Defendants argue, and we agree, that these events do not rise to the level of adverse employment actions under Robinson and similar cases, as these actions did not affect the terms or conditions of Lawton's employment. Furthermore, in his response to the Motion for Summary Judgment, Lawton does not dispute the Defendants' characterization of these events.

Lawton fails to go beyond the pleadings regarding this issue and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e).

Instead of addressing the Defendants' arguments, Lawton alleges for the first time that he continues to be denied merit based promotions in retaliation for filing his EEOC complaint and subsequent lawsuit. However, Lawton does not identify any of the positions to which he was allegedly not promoted, nor does he point to any evidence to support his claim. Lawton cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams, 891 F.2d at 460. Lastly, even if Lawton had successfully established a *prima facie* case of retaliation, Lawton has not provided any evidence that any action taken by the Defendants was a pretext for discriminatory retaliation. See Weston, 251 F.3d at 432 (noting that the McDonnell Douglas burden shifting framework applies to retaliation claims). Therefore, Lawton has not met his burden of proof on this issue and summary judgment is appropriate on his claim of retaliation.

F. Disparate Impact Claim

In order to establish a *prima facie* case of disparate impact under Title VII and the PHRA, a plaintiff must: (1) identify a specific or particular employment practice that (2) creates a disparate impact on a protected group through statistical evidence. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989). "[T]he plaintiff is . . . responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." Id. at 656 (internal quotations omitted). Furthermore, the statistical evidence must be "of a kind and degree sufficient to show that the practice in question has caused" the disparate impact. Johnston v. City of Philadelphia, 863 F. Supp. 231, 235 (E.D. Pa. 1994)(citing Watson

v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)). Lawton claims that vague and subjective criteria with respect to merit raises, promotions and performance evaluations, while facially neutral, give management total discretion and allow them to discriminate against African-American employees. We note that a plaintiff's burden in properly identifying specific employment practices which utilize subjective criteria may be quite difficult to meet. Watson, 487 U.S. at 994.

Lawton alleges that the following employment practices allow discrimination: (1) that vague criteria are used to determine advancement at Sunoco; (2) that despite a policy to promote from within, the majority of Sunoco's managers are newly hired; and (3) that evaluations are rarely performed and thus merit based raises and promotions are not common. Lawton does not provide any evidence that these policies exist, that the majority of Sunoco's managers are newly hired, or that merit based advancements are uncommon. Not only must Lawton allege specific policies, Lawton must provide some proof that such policies exist, for he has the burden of proof to establish his *prima facie* case. Celotex, 477 U.S. at 322-23 (stating that the non-moving party has the burden of producing evidence to establish *prima facie* each element of its claim). Regardless, however, Lawton's claim also must fail because he has not established causation through properly analyzed statistical evidence.

As proof that Sunoco discriminates against African-Americans, Lawton produces data from Mascot's EEO-1 forms from the years 1995 to 2000. Mascot is Lawton's direct employer at the APlus store. These EEO-1 forms show that the average percentage of Caucasian employees in official and managerial positions to total Caucasian employees was 10.63%, while the average percentage of African-American employees in official and managerial positions to

total African-American employees was 4%. The EEO-1 forms also show that the average percentage of all Mascot employees who were Caucasian was 82.53%, while the average percentage of all Mascot employees who were African-American was 11%. However, the United States Supreme Court noted that in a disparate impact case, "the 'proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market.'" Wards Cove Packing Co., 490 U.S. at 650 (quoting Hazelwood Sch. Dist. v. U.S., 433 U.S. 299, 308 (1977)). The Wards Court further determined that statistical evidence showing a high percentage of non-white workers in cannery jobs and a low percentage of such workers in skilled non-cannery positions such as management, did not establish *prima facie* case of disparate impact. Id. at 651. This is exactly the type of inappropriate comparison that Lawton would have us make in utilizing this data.

Lawton also points out that based upon 2000 U.S. Census data, the African-American population in the Philadelphia metropolitan area was 43.2% of the total population. Therefore, Lawton argues, the available African-American work force was larger than the percentage of African-Americans working for Sunoco through Mascot. However, Lawton fails to take into account the fact that the 43.2% includes all African-Americans, including children, elderly, disabled people, and those otherwise not qualified for management positions; all of whom are not representative of the actual available qualified African-American work force. Lawton also fails to take into account that Mascot's EEO-1 forms utilize nationwide data, and thus they cannot be successfully compared to a work force percentage in a much smaller geographic area. As stated above, it is "the racial composition of the qualified . . . population in the relevant labor market" that is important to this analysis. Id. at 650.

Lawton further notes that the EEO-1 forms show that of the professional employees employed by Mascot, ten out of eleven were Caucasian in 1995; thirteen out of thirteen were Caucasian in 1996; fifteen out of fifteen were Caucasian in 1997; seventeen out of eighteen were Caucasian in 1998; fifteen out of seventeen were Caucasian in 1999; and seventeen out of nineteen were Caucasian in 2000. However, again, without comparing these numbers to "the racial composition of the qualified . . . population in the relevant labor market", the numbers are meaningless.[1] See Id. Lastly, Lawton states, without further analysis, that "[t]he personnel files of other Sunoco employees shows the disparity between the salaries of African-American employees versus that of employees of other races. *See* Appendix 1" (Resp. Summ. J., 25). Appendix 1 to Lawton's Response includes charts prepared by Lawton of the wages allegedly earned by various Sunoco employees, without citation to any evidence. Without some analysis by Lawton; controls for a number of factors including educational experience, job performance, or work experience; or an attempt to show the statistical significance of his data, this information loses its possible value.

Although Lawton has provided various percentages, he has failed to sufficiently or properly analyze these numbers, attempt to control for any variables, or compare them to the correct qualified population. Therefore, even if Lawton had sufficiently alleged a specific or particular employment practice, he has failed establish that the practice creates a disparate impact on a protected group through proper or sufficient statistical evidence. Therefore, Lawton's claim for disparate impact must fail and summary judgment is appropriate on this claim.

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[1] Furthermore, this information concerning *professional employees* has little relevance to Lawton's claim that employment practices regarding advancement to *managerial* positions create a disparate impact on African-Americans.

G. Intentional Infliction of Emotional Distress

The Pennsylvania Workers Compensation Act, 77 Pa. C.S.A. § 481(a) ("WCA"), "provides the sole remedy 'for injuries allegedly sustained during the course of employment.'" Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997)(quoting Dugan v. Bell Tel. of Pa., 876 F. Supp. 713, 723 (W.D. Pa. 1994)). "The exclusivity provision of that statute bars claims for 'intentional and/or negligent infliction of emotional distress [arising] out of [an] employment relationship.'" Id. (quoting Dugan, 876 F. Supp. at 724).

However, the WCA does provide one exception to the rule baring claims for intentional infliction of emotional distress if the actor was motivated by personal animus. 77 Pa. Stat. § 411(1); Fugarino v. Univ. Servs., 123 F. Supp.2d 838, 843-44 (E.D. Pa. 2000). The personal animus exception requires conduct "'that is not normally expected to be present in the workplace.'" Hettler v. Zainy Brainy, Inc., No. 99-3879, 2000 WL 1468550, at *5 (E.D. Pa. Sept. 27, 2000)(quoting Snyder v. Specialty Glass Prods., Inc., 658 A.2d 366, 374 (Pa. Super. 1995)). Here, Lawton states without further analysis or factual support that "[t]he actions taken by Maiellano, and the derogatory comments made to Lawton were inflicted for personal reasons, and not made solely within the context of employment." (Resp. Summ. J., 24). However, as stated, Lawton provides no evidence that anything was done to him for personal reasons and, in fact, states that he was never subjected to racially derogatory comments. (Lawton Dep. at 309). Therefore, because all of the allegedly offensive conduct occurred at work and appears to have arose out of the employment relationship, the personal animus exception is not applicable. See DeWyer v. Temple Univ., No. 00-1665, 2001 WL 115461, at *5 (E.D. Pa. Feb. 5, 2001); Coney v. Pepsi Cola Bottling Co., No. 97-2419, 1997 WL 299434, at *1 (E.D. Pa. May 29, 1997).

Regardless, the alleged actions are also not sufficiently extreme and outrageous to establish a cause of action for intentional infliction of emotional distress. Lawton states that "[t]he fact that Lawton was retaliated against after filing his EEOC charge, in conjunction with the previous discrimination that he suffered based on his disability[2] and race, is sufficient to demonstrate extreme and outrageous conduct." (Resp. Summ. J., 30). In order for a plaintiff to establish a claim for intentional infliction of emotional distress, *inter alia*, "'[t]he conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.'" Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988)(quoting Buczek v. First Nat'l Bank of Mifflintown, 531 A.2d 1122, 1125 (Pa. Super. 1987)). "At the outset, it must be recognized that it is extremely rare to find conduct in the employment context that will give rise to the level of outrageousness necessary to provide a basis for recovery of the tort of intentional infliction of emotional distress." Id. Generally, the type of employment discrimination alleged by Lawton does not give rise to a claim for intentional infliction of emotional distress, and Lawton has not provided any facts or evidence which would entice us to hold otherwise. Equal Employment Opportunity Comm'n v. Chestnut Hill Hosp., 874 F. Supp. 92, 96 (E.D. Pa. 1995)(stating that "racial discrimination alone does not state a claim for intentional infliction of emotional distress."); Nichols v. Acme Markets, Inc., 712 F. Supp. 488 (E.D. Pa. 1989), aff'd, 902 F.2d 1561 (3d Cir. 1990)(same). Therefore, Lawton's claim of intentional infliction of emotional distress must fail.

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[2] Although the "Disability" box on Lawton's EEOC charge is checked, there have been no arguments or evidence submitted relating to any claim of disability.

VI. CONCLUSION

Summary Judgment is appropriate on each of the legal theories presented by Lawton. First, Lawton's claims of wage discrimination, hostile work environment, retaliation, and disparate impact fail because Lawton has not exhausted his administrative remedies on these claims. Second, Lawton's failure to promote claim fails because he has not established that he is qualified for any of the positions nor has he established that the Defendants' proffered explanation was actually a pretext for discrimination. Third, Lawton's wage discrimination claim also fails because he has not established that similarly situated Caucasian employees are paid more than he is being paid. Fourth, Lawton's hostile work environment claim also fails because he has not established any of the factors necessary to make out a *prima facie* case. Fifth, Lawton's retaliation claim also fails because he has not established that the Defendants engaged in an adverse employment action, or that there is a causal link between his protected activity and any alleged employment action. Sixth, Lawton's disparate impact claim also fails because he has not sufficiently established any specific policies which create a disparate impact on a protected group through proper or sufficient statistical evidence. Last, Lawton's intentional infliction of emotional distress claim fails because it is barred by the WCA and because he fails to allege conduct that is sufficiently extreme and outrageous.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEO LAWTON,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 01-2784
SUNOCO, INC., MASCOT PETROLEUM COMPANY, INC., and LOUIS MAIELLANO,	:	
Defendants.	:	

ORDER

AND NOW, this 17th day of July, 2002, upon consideration of the Defendants' Motion for Summary Judgment (Dkt. No. 21), and any Responses and Replies thereto, it is hereby ORDERED that the Motion is GRANTED and the case is dismissed with prejudice. The Clerk of Courts is hereby directed to mark this case as closed.

BY THE COURT:

Robert F. Kelly, Sr. J.